(3)

No. 04-469

In the Supreme Court of the United States

TOWN OF SURFSIDE, FLORIDA, PETITIONER

v.

MIDRASH SEPHARDI, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The United States intervened as a party in this litigation solely for the purpose of defending the constitutionality of federal law, pursuant to 28 U.S.C. 2403.* The United States therefore addresses only the following questions:

1. Whether the requirement, in the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, that government not impose or implement land use regulations in a manner that treats religious entities on less than equal terms than secular entities, 42 U.S.C. 2000cc(b), exceeds Congress's legislative authority under Section 5 of the Fourteenth Amendment.

2. Whether the requirement, in the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, that government not impose or implement land use regulations in a manner that treats religious entities on less than equal terms than secular entities, 42 U.S.C. 2000cc(b), violates the Establishment Clause.

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* The United States filed a separate brief as amicus curiae on certain statutory construction questions raised in the case. The United States' certiorari-stage filing as a respondent in this Court, however, is limited to the issues it participated in below as a party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 366 F.3d 1214. The opinions and orders of the district court (Pet. App. 56a-57a, 58a-59a, 60a-63a, 64a-67a, 68a-80a, 81a-93a, 94a-100a, 101a-126a, 127a-161a) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 21, 2004. A petition for rehearing was denied on July 13, 2004 (Pet. App. 162a-163a). The petition for a writ of certiorari was filed on October 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803, codified at 42 U.S.C. 2000cc *et seq.*, is a civil rights law designed to provide, as a matter of statutory right, protection against religious discrimination, unequal religious accommodations, and unjustified infringement of the free exercise of religion in two specific contexts. Section 2 of RLUIPA applies to religious exercise in the context of land use regulation. 42 U.S.C. 2000cc. Section 3 of RLUIPA protects the free exercise of religion by institutionalized persons. See 42 U.S.C. 2000cc-1.

This case involves RLUIPA's land use provisions. Section 2(a)(1) of RLUIPA provides that no state or local government "shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution" is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc(a)(1). That restriction on governmental action only applies, however, in cases where

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or the removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian

tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

42 U.S.C. 2000cc(a)(2).[1]

RLUIPA's land use provisions also include a separate equal treatment provision, which prohibits state and local governments from imposing or implementing land use regulations "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. 2000cc(b)(1), or that "discriminate[] against any assembly or institution on the basis of religion or religious denomination," 42 U.S.C. 2000cc(b)(2). RLUIPA further provides that state and local governments shall not "impose or implement a land use regulation that * * * totally excludes religious assemblies from a jurisdiction; or * * * unreasonably limits religious assemblies,

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[1] If the only jurisdictional basis for applying RLUIPA is that the burden on religion affects "commerce with foreign nations, among the several States, or with Indian tribes," the provision still will not apply "if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. 2000cc-2(g).

institutions, or structures within a jurisdiction." 42 U.S.C. 2000cc(b)(3).

RLUIPA creates a private right of action, which allows any individual whose exercise of religion has been substantially burdened to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to obtain "appropriate relief against a government." 42 U.S.C. 2000cc-2(a). The United States also may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f). In enacting RLUIPA's land use provisions, Congress expressly invoked its authority under Section 5 of the Fourteenth Amendment, the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3), and the Spending Clause (U.S. Const. Art. I, § 8, Cl. 1).

2. The private respondents, Midrash Sephardi and Young Israel of Bal Harbour, are two small Orthodox Jewish congregations located in the town of Surfside, Florida, which is a small, oceanfront community. Pet. App. 2a-3a. In addition to providing services on Holy Days and on the Sabbath, the congregations hold daily prayer sessions, and host various religious and social functions, community meals, lectures and group discussions, meetings on community welfare and public service activities, and singles events. *Id.* at 6a-7a. As adherents of the Orthodox Jewish faith, members of the congregations are required to walk to religious services on Holy Days and on Saturdays. The congregations thus need to be physically located within walking distance of their members. *Id.* at 7a.

The zoning code of the town of Surfside divides the town into various districts and delineates the permitted uses in each district. Churches and synagogues are not allowed as of right anywhere in Surfside. Pet. App. 3a-5a. Churches may be permitted as a "conditional use"

within the "RD-1" two-family residential district, *id.* at 3a-4a, but only if they "clearly show[] that the public health, safety, morals, and general welfare will not be adversely affected," *id.* at 4a n.2, and satisfy any other conditions for approval established by the zoning commission, *ibid.* Churches and synagogues are prohibited in every other district. *Id.* at 4a-5a, 128a-129a & n.1. While other entities may obtain a special use exception to locate in the business district, churches and synagogues are debarred from seeking such an exception. *Id.* at 5a n.3. In addition, while excluding religious assemblies, the Surfside zoning code permits secular private clubs and lodge halls to locate above the first floor in the business district. *Id.* at 4a-5a. The Code defines a "private club" as "a building and facilities or premises, owned and operated by a corporation, association, person or persons for social, educational or recreational purposes, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." *Id.* at 29a (emphasis omitted).

For nearly a decade, Midrash Sephardi has been located in several rented rooms on the second floor of a bank in Surfside. The bank building is in the town's business district—with zoning designation B-1—in which churches and synagogues are prohibited. Pet. App. 5a, 128a. Young Israel originally leased its premises in a hotel located in the tourist district—with zoning designation RT-1—in which churches and synagogues are prohibited. *Id.* at 6a, 128a. Young Israel now shares space in the business district with Midrash Sephardi. *Id.* at 6a.

3. After petitioner initiated efforts to enjoin the continued operation of Midrash Sephardi and Young Israel, the two congregations filed suit alleging that petitioner's zoning scheme violates their rights under the

First and Fourteenth Amendments, as well as the Florida Religious Freedom Restoration Act of 1998, Fla. Stat. Ann. § 761.03 (West Supp. 2005). Pet. App. 9a, 157a. The district court granted summary judgment to Surfside on all but one of the constitutional and statutory counts. *Id.* at 127a-161a.[2]

Following the September 2000 enactment of RLUIPA, Midrash Sephardi and Young Israel amended the complaint to add claims under RLUIPA. Pet. App. 10a. The complaint alleged that petitioner's zoning ordinance and its implementation violated RLUIPA's prohibitions against (i) "impos[ing] or implement[ing] a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 U.S.C. 2000cc(b)(1); (ii) "impos[ing] or implement[ing] a land use regulation that * * * unreasonably limits religious assemblies, institutions, or structures within a jurisdiction," 42 U.S.C. 2000cc(b)(3); and (iii) imposing a substantial burden on the free exercise of religion that is not in furtherance of a compelling governmental interest and accomplished by the least restrictive means, 42 U.S.C. 2000cc(a)(1). Pet. App. 16a, 24a, 105a-125a. After petitioner defended, in part, by challenging the constitutionality of RLUIPA, the United States intervened to defend the law pursuant to 28 U.S.C. 2403.

The court granted summary judgment to petitioner on each of the RLUIPA claims. With respect to the claim that petitioner failed to treat religious entities on

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[2] The one count concerned an allegation of disparate treatment between the respondent congregations and a different Jewish synagogue, see Pet. App. 94a-100a, a claim that is not at issue before this Court.

equal terms with other secular assemblies, the district court ruled that the private clubs permitted by petitioner are not similarly situated to churches and synagogues, because petitioner could reasonably conclude that, "on a general scale," religious assemblies do not "optimize 'cross-shopping behavior.'" Pet. App. 85a, 92a-93a. The court held, secondly, that the claim that petitioner unreasonably limited the establishment of religious entities within the jurisdiction failed because Midrash Sephardi and Young Israel had not applied for a conditional use permit within the residential district, and there was no record evidence indicating that such an application would be denied. *Id.* at 123a-125a. Finally, the court held that the congregations' "substantial burden" claim failed because the fact that some members of the congregation would be unable to walk to services if the synagogues were relocated to the residential district did not amount to a substantial burden on religion. *Id.* at 105a-110a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-55a. The court affirmed the grant of summary judgment for petitioner on the "substantial burden" claim, agreeing that the difficulty some congregants would face in walking to services does not constitute a substantial burden under RLUIPA. *Id.* at 23a.[3] However, the court of appeals reversed the grant of summary judgment on the congregations' claim that petitioner failed to accord religious entities equal treatment under its zoning ordinance. *Id.* at 24a-39a. The court explained that evidence in the record established

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[3] The court of appeals did not address the claim that petitioner's zoning ordinance "unreasonably limits religious assemblies, institutions, or structures within [the] jurisdiction." 42 U.S.C. 2000cc(b)(3).

that religious assemblies serve functionally the same purposes as the private clubs permitted within the business district, *id.* at 29a-30a, and that private clubs "do not serve [petitioner's] economic and commercial goals" to any greater extent than religious entities, *id.* at 37a. Because petitioner's "stated goal of retail synergy is pursued only against religious assemblies, but not other non-commercial assemblies," the court held that the zoning ordinance was non-neutral and discriminatory. *Id.* at 35a; see *id.* at 36a (petitioner's zoning law has "improperly targeted religious assemblies for dissimilar treatment and is therefore, not neutral"). The court also found that the ordinance was not generally applicable because petitioner pursued its economic and commercial goals "only against conduct motivated by religious belief." *Id.* at 37a.

Turning to petitioner's constitutional challenges, the court of appeals confined its analysis to RLUIPA's "equal treatment" provision, which was the only RLUIPA provision that the court of appeals concluded could provide the congregations a basis for relief. The court held that the equal treatment provision is a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. Pet. App. 42a-48a. The court concluded that the equal treatment provision simply "codifies existing Free Exercise, Establishment Clause and Equal Protection rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions." *Id.* at 48a. The court further held that such legislation was justified by the evidence before Congress documenting "a significant encroachment on the core First and Fourteenth Amendment rights of religious observers." *Ibid.*; see also *id.* at 41a (discussing evidence before Congress that zoning codes

"use individualized and discretionary processes to exclude churches, especially 'new, small or unfamiliar churches . . . [like] black churches and Jewish shuls and synagogues'") (quoting *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000* (*Joint Statement*), 146 Cong. Rec. S7774 (daily ed. July 27, 2000)).

The court of appeals also rejected petitioner's Establishment Clause challenge to the equal treatment provision of RLUIPA. The court held that the equal treatment provision's codification of extant constitutional protections permissibly alleviated significant burdens on religious exercise. Pet. App. 48a-53a. Finally, the court found no merit to petitioner's Tenth Amendment challenge, because RLUIPA's equal treatment provision is valid Section 5 legislation that simply requires governments to conform their conduct to constitutional standards. *Id.* at 53a-55a.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 10-18), the court of appeals' holding that Congress had the legislative authority under Section 5 of the Fourteenth Amendment to enact the equal treatment component of RLUIPA's land use provisions does not warrant this Court's review, for two reasons.

First, there is no conflict in the circuits concerning Congress's authority to enact that provision. Quite the opposite, the decision below represents the first court of appeals' decision to address the constitutionality of either RLUIPA's land use provisions generally or its mandate of equal treatment in land use regulations in particular. The two district courts that have ruled on the constitutionality of the equal treatment provision

have upheld it. See *Williams Island Synagogue, Inc.* v. *City of Aventura*, No. 0420257CV, 2004 WL 1059798 (S.D. Fla. May 6, 2004); *Freedom Baptist Church* v. *Township of Middletown*, 204 F. Supp. 2d 857 (E.D. Pa. 2002). Likewise, virtually every district court that has addressed Congress's authority under Section 5 of the Fourteenth Amendment to enact RLUIPA's land use provisions has upheld the constitutionality of the law. See *Congregation Kol Ami* v. *Abington Township*, No. Civ. A. 01-1919, 2004 WL 1837037, at *9-*12 (E.D. Pa. Aug. 17, 2004), amended by 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004); *Castle Hills First Baptist Church* v. *City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *18-*19 (W.D. Tex. Mar. 17, 2004); *Primera Iglesia Bautista Hispana of Boca Raton, Inc.* v. *Broward County*, No. 01-6530-CIV (S.D. Fla. Jan. 5, 2004), slip op.; *Guru Nanak Sikh Society* v. *County of Sutter*, 326 F. Supp. 2d 1140, 1157-1161 (E.D. Cal. 2003), appeal docketed, No. 03-17343 (9th Cir. Dec. 24, 2003); *United States* v. *Maui County*, 298 F. Supp. 2d 1010, 1016-1017 (D. Haw. 2003); *Murphy* v. *Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 115-122 (D. Conn. 2003), appeal docketed, No. 03-9329 (2d Cir. Dec. 22, 2003); *Westchester Day Sch.* v. *Village of Mamaroneck*, 280 F. Supp. 2d 230, 234-238 (S.D.N.Y. 2003), vacated on other grounds, 386 F.3d 183 (2d Cir. 2004); *Life Teen, Inc.* v. *Yavapai County*, No. 01-1490 (D. Ariz. Mar. 26, 2003), slip op.; *Christ Universal Mission Church* v. *City of Chicago*, No. 01 C 1429, 2002 U.S. Dist. Lexis 22917 (N.D. Ill. Sept. 11, 2002), rev'd on other grounds, 362 F.3d 423 (7th Cir. 2004), petition for cert. pending, No. 04-591 (filed Oct. 29, 2004); *Freedom Baptist Church*, 204 F. Supp. 2d at 874.[4]

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[4] The sole exception is *Elsinore Christian Center* v. *City of*

Second, the court of appeals' decision is correct. Congress's Section 5 authority extends to the enactment of legislation designed to "enforc[e] the constitutional right to the free exercise of religion." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). RLUIPA's equal treatment provision, moreover, merely codifies existing constitutional protections against religious discrimination by prohibiting governments from treating religious assemblies "on less than equal terms" with nonreligious assemblies or institutions. 42 U.S.C. 2000cc(b)(1). Like race, gender, and ethnicity, religious affiliation is among the suspect classifications traditionally protected by the Equal Protection Clause. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962).

In addition, when the government permits secular exemptions to otherwise generally applicable government regulations, the Free Exercise Clause requires that government accord equal treatment to religion-based claims for exemptions that would cause no greater harm to its interests than the secular exemptions that are already allowed. "The Free Exercise Clause protects religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 542-543 (1993) (internal quotation marks, brackets,

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Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003), which held that RLUIPA exceeds Congress's legislative authority under the Fourteenth Amendment and the Commerce Clause. But an appeal of that decision is pending, see No. 04-55320 (9th Cir.), and, in any event, the district court in that case did not address Congress's power to enact RLUIPA's equal treatment provision.

and citation omitted); see also *Board of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he Religion Clauses * * * and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 884 (1990) ("[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.") (citation omitted).[5]

Indeed, this Court in *Lukumi* applied strict scrutiny under the Free Exercise Clause to a land use provision. One of the ordinances *Lukumi* struck down prohibited the slaughter of animals outside of areas zoned for slaughterhouses. See 508 U.S. at 545. The Court held that the ordinance violated the Free Exercise Clause because it contained an exemption for commercial

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[5] See also, *e.g.*, *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359 (3d Cir.) (under *Lukumi*, the Free Exercise Clause requires the police department to provide exemptions to grooming standards for officers wearing beards for religious reasons where exemptions had been given for beards worn for health-related reasons), cert. denied, 528 U.S. 817 (1999); *Tenafly Eruv Ass'n* v. *Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) ("selective, discretionary application" of ordinance barring citizens from affixing signs and other items to telephone poles in a manner that disfavors religion "violates the neutrality principle of *Lukumi* and *Fraternal Order of Police*"), cert. denied, 539 U.S. 942 (2003); *Cottonwood Christian Ctr.* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1224 (C.D. Cal. 2002) (under *Lukumi*, the Free Exercise Clause prohibits discrimination against religion in land-use matters).

operations that slaughter small numbers of hogs and cattle, and because the City's refusal to allow comparable religious exceptions was not justified by a compelling interest. See *ibid.* "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543. Thus, the failure to accord particular sects or religion in general equal treatment can only be justified by a compelling interest advanced by the least restrictive means. *Id.* at 521-532. RLUIPA's equal treatment provision requires no more.[6]

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[6] Petitioner has failed to identify any area in which RLUIPA's equal treatment provision would impose a greater restraint upon state or local governments than the Constitution itself would. But even if RLUIPA occasionally provides slightly more protection than the Constitution mandates, the law remains valid Section 5 legislation because, under its Section 5 power, Congress may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the [Fourteenth] Amendment's text * * * in order to prevent and deter unconstitutional conduct." *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1985 (2004) (quoting *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000), and *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 728 (2003)). In addition, as *Lukumi* makes clear, the equal treatment provision operates in an area subject to heightened scrutiny under the Constitution, which enhances Congress's power to impose prophylactic remedies. See *Hibbs*, 538 U.S. at 736. Furthermore, the legislation responds to a substantial legislative record documenting that religious entities "are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation," *Joint Statement*, 146 Cong. Rec. at S7774. See *Tennessee* v. *Lane*, *supra* (upholding Title II of the Americans with Disabilities Act as applied to access to the courts based on the historic record of unconstitutional treatment of individuals with disabilities).

Petitioner's argument (Pet. 11) that "a restriction of location or preference was never equated with a restriction on religious practice" is wrong. See, *e.g.*, *Islamic Ctr. of Miss., Inc.* v. *City of Starkville*, 840 F.2d 293, 299 (5th Cir. 1988) (denial of use permit for mosque in area easily accessible to university students created substantial burden on religion in violation of the Free Exercise Clause); *Keeler* v. *Mayor & City Council*, 940 F. Supp. 879, 880, 883-884 (D. Md. 1996) (barring church from demolishing monastery and chapel and replacing it with more modern facilities was a substantial burden on free exercise); *Alpine Christian Fellowship* v. *County Comm'rs*, 870 F. Supp. 991, 994-995 (D. Colo. 1994) (denial of special use permit to operate religious school in church building created substantial burden on religion in violation of free exercise); *First Covenant Church of Seattle* v. *City of Seattle*, 840 P.2d 174, 183 (Wash. 1992) (restrictions on church altering its exterior substantially burdened its religious exercise in violation of the Free Exercise Clause). Indeed, this Court's First Amendment jurisprudence has long acknowledged that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)), and petitioner offers no reason why religiously motivated speech and assembly should be accorded different treatment. Cf., *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).[7]

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[7] In fact, two courts have held that the First Amendment's Free Speech and Assembly Clauses also prohibit discrimination against religious institutions with respect to land use. See

2. The court of appeals' holding that RLUIPA comports with the Establishment Clause also does not merit this Court's review (see Pet. 18-19). Again, this is the first court of appeals decision to address whether RLUIPA's equal treatment provision in particular, or the land use provisions in general, are valid under the Establishment Clause. Every district court to address the question has ruled that the land use provisions are consistent with the Establishment Clause. See *Congregation Kol Ami*, 2004 WL 1837037, at *12-*14; *Williams Island Synagogue*, 2004 WL 1059798, at *6; *Castle Hills First Baptist Church*, 2004 WL 546792, at *18; *Westchester Day Sch.*, 280 F. Supp. 2d at 238; *Maui County*, 298 F. Supp. 2d at 1014-1015; *Murphy*, 289 F. Supp. 2d at 122-124; *Life Teen, Inc.*, slip op. 27-30.

The decision is also correct. The equal treatment provision simply tracks the Establishment Clause's own prohibition on religious discrimination, and thus promotes, rather than runs afoul of, Establishment Clause principles. See *Lukumi*, 508 U.S. at 532 ("[I]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general."); *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (government may not

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Cornerstone Bible Church v. *City of Hastings*, 948 F.2d 464, 468-471 (8th Cir. 1991); *Vineyard Christian Fellowship* v. *City of Evanston*, 250 F. Supp. 2d 961, 984 (N.D. Ill. 2003). RLUIPA's equal treatment provision thus also codifies existing constitutional protections for free speech and assembly as applied to religious adherents.

"prefe[r] those who believe in no religion over those who do believe").[8]

On October 12, 2004, this Court granted review in *Cutter* v. *Wilkinson*, No. 03-9877, to consider whether RLUIPA's separate statutory provision protecting the religious exercise of institutionalized persons is consistent with the Establishment Clause. The Sixth Circuit in *Cutter* ruled that, in light of the unique dynamics of the prison environment, RLUIPA's institutionalized persons provision violates the Establishment Clause. See 349 F.3d 257 (6th Cir. 2003). The Court may wish to hold this case pending its disposition of *Cutter*.

The United States does not object to that approach. It bears emphasis, however, that the narrow Establishment Clause question presented here is unlikely to be influenced by this Court's resolution of *Cutter*. The case at hand involves only the equal treatment mandate of RLUIPA's land use provisions. That mandate has no

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[8] To the extent that the equal treatment provision requires any accommodation of religion beyond what the Constitution itself mandates, it is constitutional. "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987). Moreover, just last Term, the Court reaffirmed that " 'there is room for play in the joints' between" the Free Exercise and Establishment Clauses, such that government can accommodate religion beyond what the Free Exercise Clause mandates, without violating the Establishment Clause. *Locke* v. *Davey*, 124 S. Ct. 1307, 1311 (2004) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970)); see also *Kiryas Joel*, 512 U.S. at 705 (the Court's cases "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987).

statutory counterpart in RLUIPA's institutionalized persons provision, and thus is not at issue in *Cutter*. Rather, the institutionalized persons provision in *Cutter* applies a statutory compelling interest test to state actions that substantially burden the religious exercise of institutionalized persons. See 42 U.S.C. 2000cc-1(a)(1) and (2). While the operation of that provision often helps to prevent sectarian discrimination in institutionalized settings, the RLUIPA land use provision at issue here is a distinct statutory directive that specifically and narrowly parallels the Constitution's own prohibition on religious discrimination in the precise context of land use regulation.[9]

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[9] Nor is there any overlap between this case and *Cutter* on the question of Congress's authority to enact the respective provisions of RLUIPA. The equal treatment provision upheld here reflects an exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. Congress, however, did not invoke its Section 5 power as a basis for enacting RLUIPA's institutionalized persons provision. Instead, Congress relied on its Commerce and Spending Clause powers. See 42 U.S.C. 2000cc-1(b)(1) and (2). At this stage, there has been no finding in the record of the present case either that petitioner receives federal funding or that petitioner's zoning decision affects interstate commerce.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be denied. With respect to the second question presented, the petition for a writ of certiorari should be held pending this Court's decision in *Cutter* v. *Wilkinson*, No. 03-9877, or, in the alternative, should be denied.

Respectfully submitted.

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